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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ALAN JOHNSON, Defendant and Appellant.	H023290 (Santa Clara County Super. Ct. No. C9945830)

Defendant Gregory Alan Johnson appeals after conviction, by jury trial, of first degree murder (Pen. Code, § 187)[1] and first degree robbery (§§ 211, 212.5). He was sentenced to a prison term of 25 years to life for the murder; the trial court stayed a prison term of four years for the robbery.

On appeal, defendant contends the trial court erred by: (1) excluding evidence of the victim's reputation for violent sex; (2) giving erroneous instructions felony-murder and robbery; (3) failing to give complete instructions on aiding and abetting; (4) failing to instruct on theft as a lesser included offense to robbery; (5) failing to give complete instructions on self-defense; and (6) instructing the jury pursuant to CALJIC No. 17.41.1. Defendant also claims that trial counsel was ineffective. We will affirm the judgment.

[1] Unspecified section references are to the Penal Code.

I. BACKGROUND

In August of 1999, defendant was released from a "penal institution" in Colorado. Before his release, defendant wrote to his friend Harry Campbell, who lived in San Francisco. Defendant asked Campbell to send him "dress-out clothes" and money for a bus ticket to San Francisco. Campbell complied with both requests.

Defendant arrived in San Francisco in the early morning on September 11, 1999. That day, defendant visited Campbell. During the visit, defendant's friend Clay Catlin called Campbell's apartment, looking for defendant. Defendant and Catlin spoke and made plans to meet that day.

Campbell saw both defendant and Catlin in San Francisco on September 12, 1999. Catlin came to Campbell's apartment looking for defendant. Defendant came to Campbell's apartment and asked Campbell for more money. Campbell would not give defendant any more money.

The evening of September 12, 1999 was the last time that the victim, Renato Dy, was heard from. Dy spoke to his aunt, Elsie Silva, on the telephone at about 9:00 p.m. that night. At the time, Dy was in Emeryville, shopping at Circuit City with his cousin.

On Monday, September 13, 1999, defendant briefly met up with his friend Maurice Ray Sherer, who lived in San Francisco. Defendant was driving a car that he claimed belonged to his uncle. In fact, the car belonged to Dy.

On Tuesday, September 14, 1999, defendant met Sherer in Golden Gate Park. Sherer and defendant drank some beer together, then drove to Pier 39 at Fisherman's Wharf. Defendant asked Sherer to buy a radio from him. The radio was in the trunk of the car along with a "bunch of junk." Sherer gave defendant $7.00 for the radio.[2]

[2] At trial, Sherer admitted that he had recently been convicted of being a felon in possession of a firearm. He also admitted a conviction of violating Health and Safety Code section 11353, "for sales of drugs to a minor." Concerned about liability for

Defendant told Sherer that "he had killed a man." Defendant described strangling the man with a belt "or something," gesturing to demonstrate how he had done it. Sherer "laughed it off" because he considered defendant "a storyteller." Sherer did notice that defendant had some scratches on his hand, but thought that "it looked like paper cuts." Defendant told Sherer that "somebody was with him" during the incident.[3]

Sherer believed that defendant was gay; he knew that defendant hung out with gay men. In the past, defendant had hung out in the Polk Street area of San Francisco. He would return from the area with money. Sherer believed that defendant had been "prostitut[ing] himself," although defendant claimed "that he was robbing gay people."

On Wednesday, September 15, 1999, Dy's employer called Silva, reporting that Dy had not come or called in to work. Silva telephoned Dy's apartment but there was no answer or answering machine. Silva then went to Dy's San Jose apartment. Dy's brother, Robert, came along.

Silva and Robert arrived at Dy's apartment at about 11:00 a.m. The apartment was locked and there was no answer when they knocked on the door. They contacted a neighbor, who in turn contacted the apartment manager. The apartment manager opened the door to Dy's apartment. Silva slipped on a thick yellowish liquid that was on the floor inside the front door. Robert discovered Dy's body in the bathroom.

San Jose police officers responded to the scene. They noticed the slippery thick orange or yellow substance on the floor. The substance was also on Dy's face and hands.

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possession of stolen property, the prosecution gave Sherer a grant of immunity for his testimony.

[3] On cross-examination, Sherer admitted he had previously testified that defendant told him "someone else" had killed Dy. On redirect examination, Sherer clarified that he only meant that "the other guy was with him." He further clarified that he had previously testified that defendant claimed to have killed Dy " 'by himself.' "

Dy had apparent ligature marks on his neck, and the police found a belt and white electrical cord that had a blood stain on it.

The police noticed a number of items with apparent evidentiary significance. There was a t-shirt purchased from Costco with a stain on it. There was a small black suitcase, which had its locks forced open. There was a box for a new NewTech brand radio, but no radio. There was no telephone, although there appeared to have been one in the apartment at some previous time. There was a used condom in the garbage can of the bathroom.

An autopsy was performed on Dy's body. The coroner determined that the cause of Dy's death was ligature strangulation, consistent with either the electrical cord or, more likely, the belt. A stab wound to Dy's neck was "a contributing factor in death," but "it was not the major factor." The coroner estimated the time of Dy's death as between the evening of Sunday, September 12, 1999, and the following morning. The yellowish-orange substance on Dy's face had caused a chemical-type burn. When washed off during the autopsy, the substance "lathered up like soap would."

A criminalist evaluated a sample of the yellowish-orange substance found in Dy's apartment and on his face. The criminalist determined that the substance was a cleanser, liquid soap, or an emulsifying agent ("a chemical or chemical mixture that will breakup [*sic*] oils and fats into a liquid such that it could be held in liquid suspension").

Telephone records from Dy's apartment indicated that three calls were placed between 10:12 p.m. and 10:15 p.m. on Sunday, September 12, 1999. These calls were to one of defendant's relatives in Oklahoma, to defendant's girlfriend in Colorado, and to defendant's mother in Southern California.

Defendant's Arrest and First Interview

On September 16, 1999, at about 7:00 p.m., a sergeant with the Routt County, Colorado, Sheriff's Office initiated a traffic stop of defendant, who had been speeding

while driving Dy's car. During the stop, dispatch informed the sergeant that there was "a felony hit" on the vehicle, indicating that someone associated with the vehicle was wanted for a felony. The sergeant requested backup and requested the dispatcher contact the San Jose Police Department. Defendant was arrested. He told the sergeant that his "friend Rudy Dy" had let him use the car to drive to Colorado.

Detective Louie Hill interviewed defendant in Colorado on September 18, 1999. He first read defendant the *Miranda* admonitions. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Defendant said he had met Dy on the afternoon of Saturday, September 11, 1999, on Polk Street in San Francisco. Defendant and Dy drove to San Jose that day at around 4:00 p.m. On Sunday, September 12, 1999, defendant and Dy drove to Costco, where Dy purchased some clothes for defendant. Defendant and Dy then drove back up to San Francisco, arriving at about 5:00 p.m. Dy offered to lend defendant the car so that defendant could return to Colorado, as defendant could not afford a plane ticket. Defendant accepted Dy's offer to lend him the car. Dy said he would take the Cal Train back to San Jose. Defendant last saw Dy at about 5:30 p.m. that day. Defendant denied returning to San Jose that night, and he denied killing Dy. Defendant claimed he spent a few more days in San Francisco and then drove back to Colorado.

Detective Hill knew that defendant's story conflicted with the statements of Dy's family, who claimed to have seen Dy alone in his car the night of Sunday, September 12, 1999. He also knew that defendant's story conflicted with the statement of Dy's neighbor, who had seen Dy's car outside his apartment at 5:15 a.m. on Monday, September 13, 1999.

Detective Hill noticed cuts and lacerations on defendant's hands. Defendant said that he had cut his right forefinger on a Pepsi can. He had obtained a blister on the palm of his hand at work before he left Colorado. He had cut his ring finger or his pinky finger while on the bus from Colorado. He could not explain one or two other cuts.

Defendant's Second Interview

On November 4, 1999, defendant was interviewed a second time, by Detective Hill and Sergeant Armando Real-Vasquez.[4] Defendant asserted that he had "no part" in Dy's death, but admitted he was present when Dy was killed. Defendant initially refused to name the person who had killed Dy, but he eventually said Clay Catlin had committed the murder.

Defendant explained that he had met Catlin in prison in Colorado. Defendant had told Catlin how he "used to rob gay men because they probably wouldn't go to the police because they were lookin to pick up people, anyway." Catlin was interested in doing the same thing, so defendant showed him where to go in San Francisco. On Saturday, September 11, 1999, Dy approached them and offered to buy them something to eat. Dy also bought some undershirts and boxers for defendant. Defendant and Catlin ended up spending the night at Dy's apartment. Catlin and Dy slept in the lower bunk bed together; they were "messin' around" while watching a pornographic videotape. Defendant slept in the upper bunk. At some point during the night, defendant and Catlin left and drove around for a while. Defendant cut his finger while smoking marijuana.

The next day, Sunday, September 12, 1999, Dy bought defendant some clothes at Costco. All three men then drove back to San Francisco. Dy dropped defendant and Catlin off while he went to Emeryville. Dy later returned to pick up defendant and Catlin, then drove them back to his apartment again.

Defendant asked Dy if he could borrow Dy's car to drive back to Colorado. Dy agreed. Defendant made a few telephone calls, then took the car and left. He went back to San Francisco. On Monday, Catlin appeared in San Francisco. Catlin said he wanted to return to Colorado and told defendant, "you gotta get rid of the car." Defendant asked

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[4] The jury heard an audiotape of a portion of this interview. The jury was instructed that it could consider this interview for impeachment purposes only.

"why," but Catlin would not tell him. Catlin showed defendant some credit cards. Defendant asked where Catlin had obtained them, but Catlin would not tell him. Later, Catlin gave defendant one of the credit cards and defendant saw Dy's name on it. Later that night, Catlin told defendant, " 'I killed him.' " Catlin stated that he had strangled Dy.

Informant Riley Jones

Riley Ralph Jones, an inmate in county jail, met defendant while both were in the maximum security portion of the jail. They communicated through holes in the door. Defendant also wrote some notes to Jones during his incarceration.

Defendant told Jones that he had "killed a man." Defendant said that he had met Dy and had gone to Dy's home to engage in sex. Defendant told Jones that there had been a struggle, and that he had stabbed and strangled Dy in the living room. Defendant told Jones that he had dragged Dy's body to the bathroom, where he cleaned Dy's fingernails and washed Dy's hands. Defendant claimed he committed the murder in order to take things from Dy. He claimed to have taken stereo equipment, telephones, jewelry, some money, and Dy's car. Defendant then went to San Francisco to try to sell some of the items, so he could get back to Colorado.

When Jones asked defendant why he had killed Dy "for such a small amount," defendant replied " 'fuck that fagot.' " Also at that point, defendant told Jones, "I didn't do it, I had a crimie," meaning he had a crime partner.

Jones conveyed some of this information in a letter to the prosecution, postmarked November 22, 1999.[5] Detective Hill interviewed Jones several times. Detective Hill then searched defendant's cell pursuant to a search warrant. He found a two-page letter

[5] Jones was in jail for possession of stolen property. He admitted a prior conviction for petty theft with a prior. The prosecutor "made no promise" to Jones but said that if Jones testified, he would advise the sentencing court of Jones's cooperation.

"addressed to Steve 'from a loyal homie, ha, ha, ha.' " The letter was in defendant's handwriting. Detective Hill also seized all of the police reports in defendant's possession, in order to determine whether Jones was telling them information contained in the police reports.

On September 1, 2000, Detective Hill performed another search of defendant's jail cell, pursuant to another search warrant. He located a document that, according to defendant, contained Dy's written authorization allowing defendant use of his car. The document was in defendant's handwriting. Detective Hill also located typewritten versions of the document. It was apparent that Dy's signature –obtained from sales receipts, which were also found in defendant's jail cell – had been taped on and that liquid paper had been used on the documents.

Defendant's Trial Testimony

Defendant was charged with Dy's murder (§ 187) and first degree robbery (§§ 211, 212.5). Defendant, who was 23 years old at the time of trial, in April of 2001, testified in his own defense. Catlin did not testify at trial. Evidence was introduced indicating that defendant had instructed Catlin to invoke his Fifth Amendment privilege against self-incrimination if he was called to testify.

Defendant testified that he had lived in San Francisco, in 1997. At that time, he had worked as a male prostitute, and he had worked for an escort service. Defendant had met Dy during this time period. Dy had been a "client"; defendant would "find somebody for him."[6]

After returning to San Francisco on September 11, 1999, defendant showed Catlin where to get work as a male prostitute. Defendant then ran into Dy, who asked if

[6] Defendant's testimony about meeting Dy in San Francisco in 1997 was contradicted by Dy's sister and brothers, who testified that Dy did not spend any time in San Francisco during 1997.

defendant had "anybody lined up for [him]." Defendant told Dy about Catlin. Defendant and Dy drove around, but could not find Catlin. Dy offered to let defendant stay at his apartment in San Jose, and defendant accepted. On the way to San Jose, Dy bought some undershirts and boxer shorts for defendant.

At the apartment, defendant and Dy conversed until about 5:00 or 6:00 a.m. Dy asked about defendant's plan to return to Colorado for his girlfriend's prom or homecoming. Defendant said he planned to travel by bus because he could not afford a plane ticket. Dy offered to buy defendant a plane ticket. He made a telephone call and determined a ticket would cost about $800.[7] Dy then offered to lend defendant his car if defendant "hook[ed] him up with Clay."

Defendant slept at Dy's apartment, in the top bunk of Dy's bunk bed. The next day, Sunday, September 12, 1999, Dy and defendant returned to San Francisco. On the way, Dy bought defendant some clothes. In San Francisco, Defendant and Dy met up with Catlin. Defendant told Catlin, "you said you wanted to make money, here is your opportunity." Catlin and Dy spoke by themselves. Dy said he had to go to Emeryville and that he would meet defendant and Catlin later that night.

At about 8:15 or 8:20 p.m., Dy arrived at the arranged meeting spot.[8] Defendant, Catlin, and Dy drove to San Jose. Dy put on a pornographic videotape, then made arrangements to pay Catlin for oral sex. Dy brought out a black suitcase and opened it. It contained lubricant, condoms, and bondage ropes. Dy wanted to tie Catlin up, but Catlin refused. Defendant allowed Dy to tie him up instead, to show Catlin "that it was all right." Defendant lay face-down on the bed. Dy tied defendant's hands together and tied

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[7] Telephone records showed a telephone call to a travel service at 1:50 a.m. on September 12, 1999.

[8] Defendant's testimony about the time of Dy's arrival back in San Francisco was contradicted by the evidence that Dy was still in Emeryville at 9:00 p.m.

them to the bed post. Dy left the room briefly and then came back, with only a t-shirt on. Dy sat on top of defendant's legs; he had an erection. Defendant tried to use his legs to push Dy off, but he was unable to do so. He asked Dy, " 'what are you doing?' " Defendant told Dy " 'get off me.' " Instead, Dy started to pull defendant's pants down.

Defendant called for Catlin, who was in the other room. Before Catlin arrived, Dy was able to pull defendant's pants down and began attempting to sodomize defendant. Dy's penis contacted defendant's anus, but did not penetrate. Catlin arrived and defendant said something like " 'get this mother fucker off me.' " Catlin pulled Dy off of defendant. Catlin "put his hands around [Dy's] neck and rendered him unconscious." Catlin then cut the bondage ropes from defendant's hands.

Dy woke up and got up from the ground. He stumbled toward defendant and reached out. Defendant put his arm around Dy and choked him, intending only to render Dy unconscious, until Catlin said, " 'let him go.' " At that point, Dy wasn't breathing. Defendant took off his belt and started to strangle Dy again. He did this "[b]ecause he was dead and I know I killed him. And I was mad at him, mad at myself. I knew I killed him and my life wouldn't be the same . . . ."

Defendant and Catlin put Dy's pants on and then moved Dy's body into the bathroom. Catlin gave defendant a knife and told defendant to stab Dy. Defendant stabbed Dy in the throat. Defendant left the knife in Dy's throat and then stared at Dy for an hour. He eventually took the knife out and gave it to Catlin.

Catlin gave defendant some dish detergent and instructed defendant to clean Catlin's fingernails. Defendant "just couldn't do it," and instead he "just like squirted it towards the direction of his body." Catlin was responsible for the puddle in the living room: at some point, Catlin had spilled grease and then poured dish soap and cleaner on it.

Defendant denied using the electrical cord to strangle Dy. He explained why his blood was on the electrical cord, saying that he had cut himself with the belt. The cord was in the bathroom, and blood got on it when defendant threw it into the hallway.

Defendant denied taking any items from Dy's apartment. He became aware of the items in the trunk of the car after he and Catlin had driven back to San Francisco. Catlin instructed defendant to pawn some of the items. Defendant went to pawn the items while Catlin went to burn the bondage ropes. Defendant never pawned the items, however. He eventually put them back in the trunk of Dy's car. At that point, he called Ray Sherer and met him. Defendant gave Sherer some of the items.

Defendant acknowledged lying to the police during his interview in Colorado. He explained that he lied about when he met Dy because he "didn't want to expose" his friend who ran the escort service. He did not mention Catlin because he "felt like [he] owed the guy."

Defendant also acknowledged that he lied during his police interview in San Jose. He blamed Catlin for the murder at that point, because he "didn't want to be blamed for it."

Defendant claimed that most of Riley Jones's testimony was untrue. Another inmate in jail had suggested that defendant create written proof that Dy had given him permission to use the car.

Instructions and Argument

The jury was instructed on first degree felony-murder, second degree murder, voluntary manslaughter (based on either heat of passion or imperfect self-defense with intent to kill), and involuntary manslaughter (based on imperfect self-defense without intent to kill). The jury was also instructed that it could find defendant not guilty if it found he acted in self-defense based on a reasonable fear of imminent great bodily harm.

The prosecutor argued that defendant could not have reasonably feared imminent great bodily harm from Dy considering their different body sizes: defendant was six feet, four inches tall and weighed 200 pounds; Dy was five feet, five inches tall and weighed 125 pounds.

The prosecutor argued that the jury should convict defendant of first degree felony murder. He argued that defendant killed Dy with malice aforethought, and that the murder had occurred during the commission of a robbery. The prosecutor argued that defendant's history of robbing gay men showed that robbery was his motive for killing Dy. The prosecutor also referred to the letter written by Riley Jones, which stated that defendant had admitted his motive was robbery.

Trial counsel argued that defendant did not intend to rob Dy. He pointed out that defendant had spent a significant period of time in the apartment with Dy, and made numerous telephone calls. Trial counsel further argued that defendant actually and reasonably feared Dy was going to forcibly sodomize him. He argued that the killing occurred when defendant was in the heat of passion and that defendant did not intend to kill Dy: "If [defendant] is guilty of anything, he is guilty of involuntary manslaughter."

Trial counsel further argued that Dy was not killed " 'in the commission' " of the robbery. He argued that defendant did not have the intent to rob Dy at the time he killed Dy: "The felony has to precede the murder or the killing, it cannot follow it for the felony murder rule to apply."

The jury convicted defendant of first degree murder (§ 187) and first degree robbery (§§ 211, 212.5). At sentencing, the trial court imposed a prison term of 25 years to life for the murder and stayed a four-year term for the robbery pursuant to section 654.

II. DISCUSSION

A. Evidence of Victim's Reputation for Violent Sex

During in limine motions, the prosecutor objected to one of the defense's proposed witnesses, River Sims. The prosecutor described Sims as "an ordained priest in San Francisco," and read the following excerpt from the defense investigator's report: "River said he knew of the deceased, Renato Dy, who he knew as Rudy, and that he saw [defendant] get into Rudy's car sometime during the weekend prior to Rudy's death. River said that because he lived in the same place for six years and works with people on the streets, he knows or knows about people who hang out in the Polk Street area such as Rudy. [¶] River said Rudy was a John who took guys home with him, who liked anal sex, and who plays it rough with sex. River said that Rudy's MO would be to be nice to a guy, promise him things, and then demand anal sex."

The prosecutor argued that such evidence would be irrelevant. Trial counsel argued that "although the ultimate defense is . . . some other dude did it . . . I believe the testimony would show that the actual killing was in response to a violent overture done by Mr. Dy." Trial counsel noted that "if the defendant testifies," he would testify to such acts by the victim. The trial court deferred ruling on the issue.

Mid-way through trial, the trial court held further proceedings on the issue of River Sims's testimony. Trial counsel made the following offer of proof: "The offer of proof of this witness's testimony will be that at the apartment which was owned by the victim, that the victim ended up in a position with [defendant's] hands bound and was vulnerable and attempted to anally rape him." Trial counsel asserted that Sims's testimony would constitute evidence of Dy's reputation "[f]or offering people, for instance, a place to stay, a nice place, and then forcibly having sex with them." Trial counsel specified, "this is not being offered as prior acts, this is being offered as his reputation." (See Evid. Code, § 1324.) In response to the trial court's question about the

relevance of such evidence, trial counsel asserted, "The evidence would be that [Dy] was killed by the defendant in response to that."

The prosecutor argued that the defense was trying to introduce character evidence "to show conformity on the given occasion." (See Evid. Code, § 1103.) He asserted that reputation "can't be used to get a specific act in, and it can't be used for particular characteristics. It can't be used for particular instances, rather reputation is limited to the general reputation." He further claimed, "[Y]ou can't have a reputation for taking people home, tying them up and trying to sodomize them."

The trial court agreed with the prosecutor: "I am concerned about the general specificity that you are attempting to have his reputation relate to a particular act . . . ." "You're attempting to elicit almost a factual scenario, the same that fits what I now understand to be your defense on this matter, which is improper because there is no cross-examination of that. . . . [¶] This witness I suppose would come in and say, well, I know five or six instances where people have told me he has done just exactly this same thing. And that's so clearly, in my view, improper." The trial court noted that trial counsel "might be able to say that his reputation was that he was violent or that he had a quick temper or something of that nature."

Defense counsel then narrowed his request to admission of testimony that Dy had a "reputation of violent sex." The prosecutor questioned whether "you can have a reputation in a community for violent sex." The trial court noted, "I don't know how he could particularly know that." The prosecutor stated, "The only way he knows that is based on hearsay."

The trial court ultimately ruled as follows: "I would exclude any inquiry as to, quote, 'violent sex.' I think that his general reputation is, I presume, that he is gay. [¶] I presume his general reputation is to the fact that he is known to pick up strangers and become intimate with them is relevant and admissible."

Defendant claims the trial court should have admitted Sims's testimony about Dy's reputation for "violent sex." "The trial court is vested with wide discretion in determining the admissibility of evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 637.) The trial court's determination will be reversed on appeal only upon a finding of abuse of discretion. (*People v. Edwards* (1991) 54 Cal.3d 787, 817, 820.) "While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded ' "the bounds of reason, all of the circumstances before it being considered. . . ." ' [Citations.]" (*Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152.) "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574.)

Defendant claims that evidence of Dy's reputation for violent sex was admissible pursuant to Evidence Code section 1324, which provides: "Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule."

" 'Reputation is not what a character witness may *know* about defendant. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of him either by the witness or others.' (*People v. McDaniel* (1943) 59 Cal.App.2d 672, 676.) The rule that lay opinion testimony must be based on the witness's personal observation thus does not apply to reputation testimony." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1311.)

The People contend that the proposed evidence lacked proper foundation, because the defense had not made a showing that defendant acted in self-defense. (See *People v. Brophy* (1954) 122 Cal.App.2d 638, 647 [defendant in homicide prosecution "may introduce evidence of the turbulent and dangerous character of the deceased" if he or she lays a "proper foundation by evidence tending to show that, in committing the homicide," he or she "acted in self-defense"].) Here, defendant explained that "The offer of proof of this witness's testimony will be that at the apartment which was owned by the victim, that the victim ended up in a position with [defendant's] hands bound and was vulnerable and attempted to anally rape him." Defendant further explained, "The evidence would be that [Dy] was killed by the defendant in response to that." This offer of proof was sufficient to provide a foundation for the admission of Sims's testimony.

Defendant relies on *People v. McAlpin, supra,* 53 Cal.3d 1289 and *People v. Lamar* (1906) 148 Cal. 564. In *McAlpin,* the Supreme Court held that the trial court should have admitted testimony that the defendant had "a reputation for 'normalcy in his sexual tastes.' " (*McAlpin, supra,* 53 Cal.3d at p. 1310.) Construing the phrase to mean that the defendant did "*not* have a reputation for being sexually attracted to young girls," the court held that the evidence was "relevant to a charge of child molestation." (*Ibid.*)

In *Lamar*, the defendant was charged with murder and he claimed self-defense. A witness had testified that the victim had a good reputation for "for peace and quiet," but had acknowledged that this was not true "under all circumstances." (*People v. Lamar, supra,* 148 Cal. at p. 569.) The trial court refused to allow the witness to "explain what he meant by that answer." (*Ibid.*) The trial court also refused to allow the witness to give an opinion as to whether the victim had a good reputation "for peace and quiet when he was drunk." (*Id.* at p. 570.) The Supreme Court explained that it was proper to show the "existence of these different reputations under different conditions of mind" (*id.* at p. 572) and held that "the offer to show that the general reputation of deceased was that of a

quarrelsome, violent, dangerous man when intoxicated was both proper and pertinent." (*Id.* at p. 573.)

Even assuming that the trial court erred by excluding the evidence that Dy had a reputation for "violent sex," we would find any error harmless. Defendant argues that the error was of "federal constitutional dimension" because it affected his right to present a defense, and that therefore we should apply the "beyond a reasonable doubt" standard of *Chapman* v. *California* (1967) 386 U.S. 18, 24. Even under this standard, we find no prejudice.

First, defendant's trial testimony about Dy's violence during the sex act lacked credibility. In all of his previous iterations of the murder, defendant mentioned nothing about such an incident and never claimed he acted in self-defense. He did not make any such claims when he told Ray Sherer about the murder on September 14, 1999, when he spoke with Detective Hill on September 18, 1999, when he spoke with Detective Hill again, on November 4, 1999, or when he told Riley Jones about the murder.

It was only at trial that defendant claimed that Dy had attempted to anally rape him. But even defendant's trial testimony did not provide sufficient evidence for the jury to find that he killed Dy in self-defense. "For killing to be in self-defense, the defendant must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter. [Citation.] To constitute 'perfect self-defense,' i.e., to exonerate the person completely, the belief must also be objectively reasonable. [Citations.] As the Legislature has stated, '[T]he circumstances must be sufficient to excite the fears of a reasonable person . . . .' [Citations.] Moreover, for either perfect or imperfect self-defense, the fear must be of imminent harm. 'Fear of future harm-no matter how great the fear and no matter how great the likelihood of the harm-will not suffice. The defendant's fear must be of *imminent* danger to life or great

bodily injury.' [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, fn. omitted.) A "forcible and atrocious crime," such as rape, presents a danger to human life that may justify a homicide. (*People v. Ceballos* (1974) 12 Cal.3d 470, 478.)

According to defendant's trial testimony, defendant allowed Dy to tie him up while lying face-down on the bed. When defendant realized that Dy was attempting to sodomize him, he called for Catlin. Catlin pulled Dy off of defendant, put his hands around Dy's neck, and rendered him unconscious. Catlin then cut the bondage ropes from defendant's hands. Dy woke up and stumbled towards defendant, reaching out. Defendant then choked Dy, killing him.

Under this version of events, there was no imminent peril at the time defendant killed Dy. Defendant was no longer in danger of being sodomized by Dy. He was not tied to the bed, and Dy had just been rendered unconscious. Catlin was in the room and had been able to pull Dy from defendant. Moreover, defendant well out-sized Dy: defendant was about six feet, four inches tall and weighed nearly 200 pounds; Dy was about five feet, five inches tall and weighed about 125 pounds. There was no evidence to support a finding that defendant actually believed he needed to defend himself at that point; much less any evidence that such a belief would have been reasonable. Moreover, defendant's testimony was inherently unbelievable in light of his numerous conflicting versions of the events. On this record, even applying the *Chapman* standard, we would conclude that any error in failing to admit evidence of Dy's reputation for violent sex was harmless beyond a reasonable doubt.

B. Instructions on Intent to Steal

Defendant contends that the trial court's instructions improperly permitted the jury to convict him of felony murder and robbery based on a finding that he formed the intent to steal Dy's property after he murdered Dy.

"To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. [Citation.] '[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft.' [Citation.] The wrongful intent and the act of force or fear 'must concur in the sense that the act must be motivated by the intent.' [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 34.)

The California Supreme Court has held that CALJIC Nos. 8.21 and 9.40 "adequately cover the issue of the time of the formation of the intent to steal." (*People v. Hendricks* (1988) 44 Cal.3d 635, 643 (*Hendricks*); see also *People v. Hayes* (1990) 52 Cal.3d 577 (*Hayes*).) Those two instructions were given in this case.[9]

In *Hendricks,* the defendant proposed an instruction which would have told the jury: " 'If you have a reasonable doubt whether the defendant formed an intent to steal

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[9] The trial court instructed the jury pursuant to CALJIC No. 8.21 as follows: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit robbery and the commission or attempted commission of that crime must be proved beyond a reasonable doubt."

The trial court instructed the jury pursuant to CALJIC No. 9.40 as follows: "The defendant is accused in Count 2 of having committed the crime of robbery, a violation of section 211 of the Penal Code. [¶] Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code section 211. [¶] Immediate presence means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property. [¶] Against the will means without consent. [¶] In order to prove this crime, each of the following elements must be proved: [¶] One, a person had possession of property of some value, however slight; [¶] Two, the property was taken from that person or from his immediate presence; [¶] Three, the property was taken against the will of that person; [¶] Four, the taking was accomplished either by force or fear; [¶] And five, the property was taken with the specific intent permanently to deprive that person of the property."

from [the victims] before they were shot, then you are instructed that [the victims] were not killed in the perpetration of, or attempt to perpetrate, the crime of robbery.' " (*Hendricks, supra,* 44 Cal.3d at pp. 642-643.) The court held that the trial court had properly refused to give the instruction because it " 'merely elaborate[s] upon the general instruction[s].' " (*Id.* at p. 643; see also *Hayes, supra,* 52 Cal.3d at pp. 625, 629.)

Defendant contends that *Hendricks* and *Hayes* are distinguishable because the jury here was given a different version of CALJIC No. 8.21. The version of CALJIC No. 8.21 given in those cases told the jury: " 'The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs *as a result* of the commission of the crimes of robbery and burglary and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.' " (*Hayes, supra,* 52 Cal.3d at p. 626, fn. 9, italics added.) The version of CALJIC No. 8.21 given here provided: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs *during the commission or attempted commission* of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime." (Italics added.)

In *People v. Hughes* (2002) 27 Cal.4th 287, the jury was instructed with the same version of CALJIC No. 8.21 as was given in this case. (*Id.* at pp. 358-359 & fn. 14.) Like defendant, Hughes argued that the phrase "during the commission" instead of the phrase "as a result" rendered the instructions flawed because they failed to convey the requirement that specific intent to steal arise before the application of force. The Supreme Court was "not persuaded by defendant's speculation." (*Id*. at p. 360.) "As both parties acknowledge, the jury also was instructed pursuant to CALJIC No. 3.31, regarding the concurrence of act and specific intent. That instruction required the jury to find 'a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator.' . . . Reading CALJIC Nos. 8.21 and 9.40 together with No. 3.31, we believe that a reasonable juror would understand that defendant had to possess the

specific intent to steal prior to or during his application of the force required for the commission of the offense of robbery. Moreover, the jury also was instructed pursuant to CALJIC No. 8.81.17 that (1) the robbery-murder special-circumstance allegation could not be found true unless 'the murder was committed while the defendant was engaged in the commission of a robbery . . . or the murder was committed during the immediate flight after the commission of a robbery,' and that (2) '[t]o find the special circumstance[] referred to in these instructions as murder in the commission of robbery . . . is true, it must be proved . . . [that] the murder was committed in order to carry out or advance the commission of the crime[] of robbery . . . or to facilitate the escape therefrom or to avoid detection. [¶] In other words, the special circumstance referred to in these instructions is not established if the robbery . . . or attempted robbery . . . [was] merely incidental to the commission of murder.' [¶] We bear in mind that ' " ' "[w]hether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court." ' " ' [Citation.] So viewing the trial court's charge, we conclude that the jury was adequately informed concerning the point in time the intent to steal must have been formed, and hence the trial court had no independent obligation to instruct specifically that the intent to steal must arise prior to or during the application of force." (*Ibid.,* fn. omitted.)

Defendant claims that *Hughes*, too, is distinguishable. He acknowledges that here the jury was likewise instructed pursuant to CALJIC No. 3.31.5,[10] but notes that the jury was not instructed pursuant to CALJIC No. 8.81.17. As we read *Hughes*, the presence of

[10] The trial court instructed the jury pursuant to CALJIC No. 3.31.5 as follows: "In the crimes charged in Counts 1 and 2 and any lesser crimes thereto, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed. [¶] The mental states required are included in the definitions of crimes set forth elsewhere in these instructions."

CALJIC No. 8.81.17 was not critical to its conclusion. Before even mentioning CALJIC No. 8.81.17, the court concluded: "Reading CALJIC Nos. 8.21 and 9.40 together with No. 3.31, we believe that a reasonable juror would understand that defendant had to possess the specific intent to steal prior to or during his application of the force required for the commission of the offense of robbery." (*Hughes, supra,* 27 Cal.4th at p. 360.)

Defendant also notes that the *Hughes* jury was not provided with CALJIC No. 9.40.2, and claims that this instruction was ambiguous and confusing.[11] We note that defendant never objected to this instruction nor requested clarification below. Any challenge to this instruction is therefore waived. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 ["if defendant believed the instruction was unclear, he had the obligation to request clarifying language"].) In any event, the fact that the jury here was instructed pursuant to CALJC No. 9.40.2 does not distinguish this case from *Hughes*. CALJIC No. 9.40.2 is a correct statement of the law: it informed the jury that defendant would not be guilty of robbery if his specific intent to commit theft "was not formed until after the property was taken from the person or immediate presence of the victim." This language clearly informed the jury that defendant must have formed the specific intent to commit theft before or at the time he committed the murder, especially when read in conjunction with CALJIC 9.40, which specified that "[i]mmediate presence means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property." Under these instructions, it was clear that if defendant had already killed Dy, he would

[11] The trial court instructed the jury pursuant to CALJIC No. 9.40.2 as follows: "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed."

not be taking property from Dy's immediate presence. Thus, it was also clear that defendant had to have formed the intent to steal before he killed Dy.

Defendant claims that in light of closing arguments, there was a " 'reasonable likelihood that the jury has applied the challenged instruction[s] in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; see *People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

During closing arguments, trial counsel asserted that in order for the jury to find defendant guilty of felony-murder, "you have to find that it happened in the commission of the robbery. Well, done deal, he has the stuff afterwards. That's a robbery. No. If the taking of the items was unrelated to the killing, it is not a robbery. It is not in the commission of the robbery. [¶] 'In the commission' are the key words. I don't think that you would get any dispute about this. He may have another way of phrasing it, but 'in the commission of the crime' is the key word in that instruction. [¶] If there's a killing, and after the killing you take the goods, it may still be a robbery. But unless your intent at the time of the killing was to rob, was to take by force or fear an item from the person – not a trickery – by force or fear, unless that was your intent at the time of the killing, it is not felony murder one. [¶] The felony has to precede the murder or the killing, it cannot follow it for the felony murder rule to apply."

The prosecutor addressed this argument in rebuttal: "The vice in the argument about the first degree felony murder is the statement that [trial counsel] made that . . . in order to be a felony murder the felony has to precede, not follow. He said that. That's not the instruction. [¶] I am going to look at the instruction so I make absolutely sure, because I think I paraphrased that. The instruction that you would rely upon in a moment, when the judge gives it to you, [says] 'an unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the

perpetrator had the specific intent to commit that crime.' [¶] So I basically put that up there verbatim, except for the last part, 'when the perpetrator had the specific intent to commit that crime.' This is the specific intent we are talking about: To take, to steal. [¶] So why am I dwelling on this? It doesn't say that the taking has to precede. Rather it says if during the commission – during the commission of the underlying felony, if the killing occurs, then it is first degree felony murder. [¶] Why is this important? How does that make a difference? Because that includes the time, the preparatory time, and it includes the commission itself. The commission is only complete when they have left the apartment, and they have fled and they travel away."

Defendant claims the prosecutor's argument suggested that the jury could find defendant guilty of felony-murder and robbery if he formed the intent to steal after he killed Dy. We disagree. The prosecutor was clearly addressing trial counsel's argument that "[t]he felony has to precede murder or the killing." Trial counsel's statement suggested that the robbery had to be complete before the killing, which is an inaccurate statement of the law. The prosecutor therefore explained that this was untrue and pointed out that the instruction "doesn't say that the taking has to precede." The prosecutor never argued that defendant could be convicted of felony-murder and robbery if he formed the specific intent to steal after committing the murder.

Finally, defendant points out that during deliberations, the jury asked whether the terms "enabled" and "accomplished" were synonymous. The trial court responded by, first, defining the terms "force" and fear" pursuant to CALJIC No. 9.41. The trial court then told the jury: "The words 'enabled' and 'accomplished,' are they synonymous? In the legal sense, no. [¶] Enabled is, one definition, to accompli[sh] something else. A person could be enabled to do something and something else could be accomplished. [¶] All I could tell you is that, as far as the instruction is concerned." The trial court also re-instructed the jury on the elements of robbery pursuant to CALJIC No. 9.40. Finally, the trial court instructed the jury that "the definition as to accomplish is: To succeed in doing

something. To succeed in doing something. [¶] Accomplished means to succeed in doing something."

Defendant claims the jury's question indicates the jury was confused about whether defendant's use of force "had to be the immediate means by which the property was taken, or whether it was sufficient that the use of force happened to 'enable' the subsequent taking." While the trial court has a duty to clear up the jury's confusion regarding instructions (§ 1138), here defendant failed to object to the trial court's response – in fact, he apparently approved it. He thereby waived any claim of error. (See *People v. Kageler* (1973) 32 Cal.App.3d 738, 746.)

Even if he had not waived the claim, defendant fails to convince us that the trial court should have provided a different or more comprehensive response. Because the original instructions were "full and complete," the trial court had "discretion to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331; see also *People v. Gonzalez* (1991) 51 Cal.3d 1179, 1213.) We also note that when, as here, "a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination," and any "comments diverging from the standard should be embarked on with care." (*People v. Moore, supra,* 44 Cal.App.4th at p. 1331.) Here, the trial court did not abuse its discretion in its response to the jury's question. It directly addressed the jury's question regarding the differences between the words "enabled" and "accomplished," without endorsing a particular outcome, and it re-read CALJIC No. 9.40. This was sufficient to satisfy the trial court's duty under section 1138.

In sum, we conclude that the trial court did not misinstruct the jury regarding the requirement that the formation of specific intent to steal precede the use of force.

C. Aiding and Abetting Instructions

The trial court instructed the jury on the liability of aiders and abettors pursuant to CALJIC No. 3.00, as follows: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. [¶] Principals include, one, those who directly and actively commit the act constituting the crime, or, two, those who aid and abet the commission of the crime."

Defendant claims the trial court erred by failing to instruct the jury pursuant to CALJIC No. 3.01, which defines the terms aiding and abetting.[12] Defendant also argues that the trial court also should have informed the jury that "the requisite intent to aid and abet must be formed before or during such carrying away of the loot to a place of temporary safety." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164, italics omitted; see also *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.)

Other courts have found that it is error to give CALJIC 3.00 but not CALJIC No. 3.01. (See *People v. Ponce* (1950) 96 Cal.App.2d 327, 331 ["Whenever instructions are given to the effect that one may be convicted if he aids and abets the criminal act the two words should be clearly defined"]; *People v. Patterson*(1989) 209 Cal.App.3d 610, 617.)

Whether the error here was the trial court's giving of CALJIC No. 3.00, or its failure to give CALJIC No. 3.01, it is clear defendant was not prejudiced. The

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[12] CALJIC No. 3.01 provides: "A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] [A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be present at the scene of the crime.] [¶] [Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.] [¶] [Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]"

prosecution did not proceed on an aiding and abetting theory. Rather, the prosecution sought to prove that defendant himself killed and robbed Dy. Moreover, there was no substantial evidence that defendant merely aided and abetted Catlin in robbing Dy. Defendant claimed Catlin took items without defendant's knowledge: if true, this testimony would not have supported a finding of aiding and abetting liability.

Under these circumstances, it is not "reasonably probable" that a result more favorable to defendant would have been reached had the trial court given further aiding and abetting instructions, or had the trial court dispensed with CALJIC No. 3.00. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Ponce, supra,* 96 Cal.App.2d at pp. 331-332.) Any error was therefore harmless.

D. Lesser Included Offense Instruction

Defendant claims the trial court erred by failing to instruct the jury on theft as a lesser included offense of robbery. "Theft is a lesser included offense of robbery, which includes the additional element of force or fear." (*People v. Melton* (1988) 44 Cal.3d 713, 746.)

Initially, defendant requested the trial court instruct on "grand theft person" as a lesser included offense to the robbery charge. The trial court noted, "I presume under the factual scenario of the defendant, that's possible, lesser included." Trial counsel later withdrew his request for a grand theft instruction, and the trial court did not give such an instruction. The reasons for withdrawing the request are not apparent from the record.

The parties dispute whether the doctrine of invited error applies here to bar defendant's claim. "[A] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence." (*People v. Barton* (1995) 12 Cal.4th 186, 198.) "[T]he record must show only that counsel made a conscious, deliberate tactical choice between

having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice. A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Defendant argues that the record does not indicate that trial counsel withdrew his request for a theft instruction as a matter of tactics. It is true that the exact reasons for trial counsel's decision to withdraw the request are not apparent from the record. (Compare *People v. Cooper, supra,* 53 Cal.3d at p. 827 [invited error doctrine applied where defendant objected to second degree murder instructions because he "wanted to guard against a compromise verdict"].) However, the record does clearly indicate that counsel was not "ignorant of the choice" to have a lesser included offense instruction given. (*Id.* at p. 831.) The trial court had already indicated it was willing to give a theft instruction, and it appears that the trial court did not do so only because trial counsel made a "conscious choice" to remove that issue from the jury. (*Ibid.*)

E. Self-Defense Instructions

The trial court here instructed the jury on self-defense pursuant to CALJIC Nos. 5.12, which told the jury that a killing is justifiable if the defendant actually and reasonably believes that there is imminent danger that the victim will kill him or cause him great bodily injury.[13]

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[13] The trial court instructed the jury pursuant to CALJIC No. 5.12 as follows: "The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes: [¶] 1. That there is imminent danger that the other person will either kill him or cause him great bodily injury; and [¶] 2. That it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person for the purpose of

As noted above, a killing is justifiable if committed in order to prevent the commission of "a forcible and atrocious crime." (*People v. Ceballos, supra,* 12 Cal.3d at p. 478.) "Examples of forcible and atrocious crimes are murder, mayhem, rape and robbery. [Citation.]" (*Ibid.*) Defendant claims the trial court erred by failing to instruct the jury on this principle of self-defense pursuant to CALJIC Nos. 5.10 and 5.13.[14]

The trial court did instruct the jury pursuant to CALIJC No. 5.16, as follows: "A forcible and atrocious crime is any felony that by its nature and the manner of its commission threatens, or is reasonably believed by the defendant to threaten, life or great bodily injury so as to instill in him a reasonable fear of death or great bodily injury. [¶] Forcible sodomy is a forcible and atrocious crime."

Defendant argues that the trial court's failure to instruct the jury pursuant to CALJIC Nos. 5.10 and 5.13 interfered with his right to present a defense and should be evaluated under the *Chapman* standard. The People argue that the *Watson* standard applies. We need not resolve this issue here, because any error was clearly harmless

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avoiding death or great bodily injury to himself. [¶] A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm."

[14] CALJIC No. 5.10 provides: "Homicide is justifiable and not unlawful when committed by any person who is resisting an attempt to commit a forcible and atrocious crime."

CALJIC No. 5.13 provides: "Homicide is justifiable and not unlawful when committed by any person in the defense of [himself] [herself] [[his] [her] _____] if [he] [she] actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished. A person may act upon appearances whether the danger is real or merely apparent."

beyond a reasonable doubt. Our analysis of this issue is similar to our analysis of defendant's claim regarding the exclusion of River Sims's testimony about Dy's reputation for violent sex. First, defendant's testimony about Dy's attempt to commit a forcible sodomy lacked credibility in light of his failure to mention the incident or claim self-defense in any of his prior statements about the murder. Second, even if defendant's testimony is believed, it failed to provide any evidence that defendant faced any imminent peril at the time he killed Dy. At the time defendant murdered Dy, defendant was no longer in jeopardy of being forcibly sodomized by Dy, because Catlin had pulled Dy off and had choked Dy into unconsciousness. Catlin had removed the bondage ropes that held defendant's hands to the bed, and Catlin remained in the room when Dy recovered consciousness. Moreover, defendant well out-weighed and out-sized Dy. Finally, defendant did not testify that he killed Dy in order to prevent Dy from forcibly sodomizing him: defendant testified that he intended only to render Dy unconscious.

Under the circumstances of this case, the trial court's failure to provide the jury with complete self-defense instructions was clearly harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

F. CALJIC No. 17.41.1

Defendant claims the trial court erred by instructing the jury pursuant to CALJIC No. 17.41.1. His argument is foreclosed by the recent California Supreme Court case of *People v. Engelman* (2002) 28 Cal.4th 436. In *Engelman,* the court disapproved the use CALJIC No. 17.41.1 but found that under the facts of that case, "the giving of the instruction did not constitute constitutional error." (*Id.* at p. 444.) We reach the same result here, where there was no jury deadlock, holdout juror, or report of any juror refusing to follow the law.

G. Ineffective Assistance of Counsel

Defendant claims trial counsel was ineffective for: (1) failing to request "correct and complete instructions concerning after-acquired intent"; (2) failing to request complete instructions on self-defense (i.e., CALJIC Nos. 5.10 and 5.13); and (3) failing to request a pinpoint instruction "relating the victim's antecedent threats and assault to the reasonableness of [defendant's] response."

In order to establish that trial counsel was constitutionally ineffective, defendant must show (1) that he failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate and (2) that defendant was prejudiced thereby. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *People v. Pope* (1979) 23 Cal.3d 412, 423-425; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

Regarding the first prong, if trial counsel's omissions stemmed from an informed tactical choice that a reasonably competent attorney might make, the conviction must be affirmed. (*People v. Pope, supra*, 23 Cal.3d at p. 425; *People v. Lucas* (1995) 12 Cal.4th 415, 437; *People v. Diaz* (1992) 3 Cal.4th 495, 557.) We must be "highly deferential" to the tactical decisions made by counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 689.) There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Ibid*.)

As for the second prong, a defendant establishes prejudice by demonstrating that without the deficient performance there is a reasonable probability the result would have been more favorable. In other words, even if counsel's actions fall below the threshold of reasonableness, appellant must still demonstrate that counsel's actions were prejudicial. (*People v. Ledesma, supra*, 43 Cal.3d at p. 218.) In fact, we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice . . . , that course should be followed." (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

Defendant's claim that trial counsel was ineffective for failing to request "correct and complete instructions concerning after-acquired intent" lacks merit for reasons explained above (see part II, B, *ante*): in light of Supreme Court precedent, the instructions given were fully adequate.

Defendant's claim that trial counsel was ineffective for failing to request CALJIC Nos. 5.10 and 5.13 also lacks merit for reasons already explained (see part II, E, *ante*): as there was no evidence to support a jury finding that defendant killed Dy in self-defense, it is clear beyond a reasonable doubt that the trial court's failure to give those instructions was not prejudicial.

Defendant's final claim is that trial counsel was ineffective for failing to request a pinpoint instruction "relating the victim's antecedent threats and assault to he reasonableness of [defendant's] response."

"It is well settled a defendant asserting self-defense is entitled [upon request] to an instruction on the effect of antecedent threats or assaults *by the victim* on the reasonableness of defendant's conduct [Citations.]" (*People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1663-1664, emphasis in original.) In *People v. Pena* (1984) 151 Cal.App.3d 462, an appellate court concluded that the trial court's refusal to give an instruction requested by the defendant, who was charged with murder and convicted of voluntary manslaughter, regarding the effect of the defendant's knowledge of the deceased's threats against him was reversible error. (*Id*. at pp. 468, 474, 478.)

According to defendant's trial testimony, defendant killed Dy when Dy got up off the floor and starting coming towards him. Dy's approach came after he attempted to sodomize defendant and after Catlin rendered him unconscious. Defendant argues that the jury could have found that defendant reasonably feared Dy would renew his sexual assault. Defendant contends that instructions on the effect of antecedent threats would

have told the jury it could consider the attempted sodomy as justifying defendant's act of choking Dy to death.

Defendant again fails to establish he was prejudiced by any omission by trial counsel. There was no evidence here supporting a finding that defendant honestly believed he was in imminent danger of being sodomized by Dy. Even considering Dy's alleged attempt to sodomize him, it was clear defendant could not have perceived any imminent danger. Catlin had just choked Dy into unconsciousness and he had untied defendant's hands from the bondage ropes. Defendant was much taller than Dy and weighed much more than him. Without his hands being tied, with Catlin available, and with Dy recovering from unconsciousness, defendant could not have honestly entertained a fear of being forcibly sodomized that would have justified the killing.

Thus, had trial counsel requested pinpoint instructions on the effect of the victim's antecedent threats and violence, the trial court could reasonably have declined to give such instructions. Moreover, any failure to give such instructions would have been clearly non-prejudicial.

Because there is no reasonable probability the result would have been more favorable had trial counsel requested the instructions identified by defendant, we reject his claim that counsel was ineffective. (*People v. Ledesma, supra*, 43 Cal.3d at p. 218.)

III. DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
PREMO, ACTING P.J.

_____
WUNDERLICH, J.